QUESTION PRESENTED

Was the City of Pittsburgh's 1986 Christmas season display which included a Christmas tree, a menorah, seasonal decorations and wholly secular seasonal advertising violative of the Establishment Clause of the First Amendment to the United States Constitution because it included a menorah?

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No. 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE PETITIONER, CITY OF PITTSBURGH

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit are reported

at 842 F.2d 655, and appear at pp. 1a-37a of the Petition for Writ of Certiorari. The Memorandum Opinion of the United States District Court for the Western District of Pennsylvania is not officially reported and appears at pp. 40a-44a of the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 15, 1988. On April 19, 1988, the Court of Appeals entered an Order denying the City of Pittsburgh's Petition for Rehearing Before the Court In Banc. The mandate of the Court of Appeals was issued on May 18, 1988. The Petition for Writ of Certiorari was filed on July 16, 1988, and the Writ was issued on October 3, 1988. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Statute Involved

2. 42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The City of Pittsburgh ("City"), as part of its holiday seasonal display, included a menorah, a type of candelabrum used in connection with the Jewish holiday of Chanukah, which occurs during the Christmas season. The City's Christmas seasonal display is in the front outside rotunda of the City-County Building which is located in downtown Pittsburgh. This building houses the principal offices of the City, as well as courtrooms and "row offices" supporting the Court of Common Pleas of Allegheny County. While the building is jointly owned with the County of Allegheny ("County"), the County has no involvement with the City's display. The County's display, which includes the creche, is located in the Courthouse one block from the City-County Building. It houses the County's principal offices, as well as courtrooms for the Court of Common Pleas of Allegheny County.

The City's Christmas season display has been at the same location for many years and had included a menorah for a number of years. The 1986 display, which is typical of prior displays, included a Christmas tree of approximately 45 feet in height decorated with tinsel, bulbs and bells; the menorah; a separate, standing sign which set forth the amount of funds proposed as the City's goal in the United Fund campaign in the current year; a sign advertising a tropical flower display at the City's Phipps Conservatory;

and tinsel and paper-mache bells above and around the background doorways leading to the interior of the City-County Building. There are no public ceremonies or activities connected with the display.

There was also a sign in front of the tree which stated the purpose of the display. The sign read:

SALUTE TO LIBERTY

DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

RICHARD S. CALIGUIRI, MAYOR

The menorah is not owned by the City, but by the Intervenor, Chabad. However, the City erects and takes down the menorah and stores it between seasonal displays. The District Court found "the expense to the City is minimal and of no consequence." (Cert. Pet. 42a).

Chanukah, Days or Feast of Dedication, is a Jewish feast that marks the rededication of the temple in Jerusalem following its recapture in 164 B.C.E. (J.A. 138). It is a home festival centering on the kindling of candles at dusk. It is celebrated to symbolize the Jewish nation's victory over religious persecution. The menorah became associated with this feast when the temple was reoccupied, and it was relit after the temple was recaptured. It was believed to have oil for only one day but burned for eight. (J.A. 263-64).

The menorah is not an object of worship (J.A. 146); not a symbol of the Jewish religion (J.A. 240); lighting of a menorah by a non-Jew is not a religious act (J.A. 148); and

the menorah has no particular religious significance when placed in a public location beyond signifying a message of ethnic pride. (J.A. 236-37).

To prevent both the City's and the County's 1986 seasonal displays, Respondents filed an action seeking a preliminary and permanent injunction on the basis that the City's inclusion of a menorah and the County's inclusion of a creche violated the Establishment Clause of the First Amendment to the United States Constitution.

Two hearings were held in the District Court. On December 15, 1986, a hearing was held on Respondents'-Plaintiffs' Motion for Preliminary Injunction. The Court denied Respondents' Motion for a Preliminary Injunction and concluded that the display did not violate the Establishment Clause.

Subsequent to the hearing on the Motion for Preliminary Injunction, Chabad filed a Motion to Intervene and Adduce Limited Evidence. (J.A. 34). Both the City (J.A. 53) and Respondents (J.A. 48) filed answers opposing intervention by Chabad. Nevertheless, the District Court granted the Motion to Intervene (J.A. 60), to give Chabad an opportunity to produce testimony as to the cultural and religious significance of Chanukah and the Chanukah menorah, as well as general evidence regarding the organization itself.

By Order dated May 8, 1987, Respondents'-Plaintiffs' Request for Declaratory Relief was denied. (Cert. Pet. 45a). In its Memorandum Opinion, the District Court, relying primarily upon *Lynch v. Donnelly*, 465 U.S. 668 (1968), concluded that the focus of the inquiry must be on a symbol in the context of the holiday season, and if there were any religious significance to the menorah, it was but an

insignificant part of another holiday display. (Cert. Pet. 43a). The District Court also concluded that there was no evidence whatsoever that the City or County displays were motivated by religious purpose, and further concluded that if the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), were applied to the case, the result would have been the same.

Respondents then filed an appeal to the United States Court of Appeals for the Third Circuit, which by a panel vote of 2-1, reversed the District Court. The panel majority relied primarily upon the second prong of the *Lemon* test and concluded that display of a religious symbol on public property may well be deemed an endorsement of religion regardless of the stated reasons for such placement. (Cert. Pet. 16a). The panel majority also predicated its decision in part upon the proposition that the display was located at or in a public building devoted to core functions of government, and was placed at a prominent site at the building where visitors would see it. (Cert. Pet. 17a). Judge Weis, the dissenting panel judge, would have affirmed the District Court on the basis that *Lynch* directly addresses and conclusively resolves the dispute, and would therefore control in favor of affirmance of the District Court. (Cert. Pet. 27a).

The City's and County's Petition for Rehearing before the Court In Banc was denied, but five Judges would have granted the rehearing. From this decision of the Court of Appeals, this Court granted the City's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The inclusion of a Chanukah menorah in the City's Christmas seasonal display does not present government

conduct that the Establishment Clause was meant to address. The drafters of the Constitution never meant it to exclude all religious manifestations from the nation's public occasions. Repeatedly, this Court has held that the traditional acknowledgements of our religious heritage are not within the application of the Establishment Clause. If the Third Circuit's holding that the mere display of an article that has some religious aspects violates the Constitution, it would be contrary to this Court's holding that the government should accommodate religion and not be hostile to it.

Even if a full-blown constitutional analysis must be undertaken, the City's seasonal display must be examined as a whole and not merely the single element that has religious aspects. Under the appropriate application of the three-part *Lemon* test, especially as to how it was applied by this Court in *Lynch v. Donnelly,* it is clear that the City's stated reason for including the menorah in this display was secular in nature; its inclusion did not have the effect of advancing religion and involves no excessive entanglement with religion. Moreover, in light of the decisions of this Court, the location of these displays is irrelevant.

To affirm the Third Circuit's ruling would disaffirm the principle of benevolent neutrality mandated by this Court's Establishment Clause decisions and sanction hostility and the exclusion of a public manifestation of religion from the nation's public occasions. For all of these reasons, the decision of the Third Circuit should be reversed.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT FORBID GOVERNMENT ACKNOWLEDGEMENT OF OUR RELIGIOUS HERITAGE.

Before a constitutional analysis of whether a particular governmental activity violates the Establishment Clause is made, the questioned activity must at least confer some benefit upon religious activities that advance religious practice or have that effect on those that involve the government directly in religious exercises. See e.g. *Stone v. Graham,* 449 U.S. 39 (1980); *Abington School District v. Schempp,* 374 U.S. 203 (1963). Other activities, even though they confer a beneficial impact on religion after going through a full-blown analysis, have been held to be constitutional. See e.g. *Zorach v. Clauson,* 343 U.S. 306 (1952); *Meek v. Pittenger,* 421 U.S. 349 (1975).

Because of the intent of the drafters of the Constitution and historical practice confirming that intent, there are public manifestations of our religious heritage that simply make the Establishment Clause inapplicable. In *Lynch v. Donnelly,* 465 U.S. at 673-680 (1968), Chief Justice Burger set forth a litany of governmental displays that are accepted without thought of a full-blown constitutional analysis specifically citing decoration of this Court's chamber with a "notable and permanent—not seasonal—symbol of religion; Moses with the Ten Commandments."[1] In *Marsh v. Chambers,* 463 U.S. 783 (1983), this Court held that the prayers beginning each session of a state legislature

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[1]*Marsh v. Chambers,* 463 U.S. at 787-792, also contains an extensive discussion of the constitutional history of the Establishment Clause and how our religious heritage has been interwoven in our public life.

by a chaplain paid by the state did not violate the Establishment Clause. This Court set forth the numerous public governmental occasions that recognized religion from the time the Constitution was ratified, and further noted their inclusion in the country's governmental occasions for over 200 years. This historical practice led the Court to state that public manifestation of our religious heritage was not the type of conduct sought to be prevented by the Establishment Clause. *Marsh v. Chambers*, 463 U.S. at 791.

The City's display at best can be deemed no more than an acknowledgement of the Jewish celebration of Chanukah which occurs generally during the Christmas season. When examined in the context of all the other objects in this display, including the Mayor's message that Pittsburghers are the "keepers of the flame of liberty," the inclusion of the menorah in this celebration is a mere acknowledgement of our religious and cultural history.

The menorah inclusion in the City's Christmas display is nothing more than government's traditional acknowledgement of various celebrations, the origins of which were entirely, or partly, religious, but the celebrations of which in modern times are manifested entirely by social and cultural activities. St. Patrick's Day is such an example.[2] Every year numerous public officials from all

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[2]The rabbi called as an expert witness for the Intervenor testified that the significance of the menorah in front of the City-County Building was analogous to the celebration of St. Patrick's Day and its parades. Each reaches out to people and sends a message of ethnic pride. (J.A. 229). This is consistent with the same witness' explanation that the message of Chanukah is cultural. Moreover, he also testified that the menorah has a universal message that "a little bit of light dispels a lot of darkness, a message of freedom of minorities to allow them to practice whatever it is that they may want to." (J.A. 230). Ironically, the menorah now being attacked under the Establishment Clause embodies the same concept.

levels of government and perhaps thousands of high school bands participate in parades and related activities. No one has suggested that such participation and activities violate the Establishment Clause. These celebrations and official acknowledgements of their existence and heritage have always been a part of United States history and culture. It is almost unnecessary to repeat that some of our country's most basic and cherished celebrations, such as Thanksgiving, derive from entirely religious observances. Even Halloween, a day now of fun for children and celebrated routinely in public schools, had religious origins. Obviously, such celebrations are removed somewhat from the Jewish celebration of Chanukah, but the question is not one of degree, but rather whether the government can validly acknowledge, without being accused of endorsement, the backgrounds of our respective cultures. As Mr. Justice Frankfurter said in his concurring opinion in *McGowan v. Maryland,* 366 U.S. 420, 503-504 (1961), "Cultural history establishes not a few practices and prohibitions, religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone."

Government acknowledgement and accommodation of our religious heritage and government sponsorship of graphic manifestations of that heritage have never been struck down as being violative of the Establishment Clause, and have been accepted over the history of this country as part of our national heritage. As Justice O'Connor stated in her concurring opinion in *Lynch v. Donnelly,* 465 U.S. at 693:

> "Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing

> public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."

To be required to ignore this heritage on the grounds that its graphic manifestation contains a religious message would constitute hostility towards religion rather than the "benevolent neutrality" that is required. *Walz v. Tax Commission,* 397 U.S. 664 (1970).

II. APPLICATION OF THE *LEMON* TEST AS INTERPRETED IN *LYNCH V. DONNELLY* DEMONSTRATES THAT INCLUSION OF A MENORAH IN THE CITY'S CHRISTMAS DISPLAY WAS NOT VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

While not the only method in applying the Establishment Clause to governmental action, this Court has most often applied the familiar three-part test, which requires that governmental action (1) "must have a secular purpose;" (2) must have a "principal or primary effect which neither advances nor inhibits religion;" and (3) "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 (1971). The parts of the test are no more than "helpful signposts" for implementation of the Establishment Clause. *Hunt v. McNair,* 413 U.S. 734 (1973), at 741.

The *Lemon* test, however, is a "convenient, accurate distillation of this Court's effort . . . to evaluate a wide range of governmental action challenged as violative of the

constitutional prohibition against laws respecting an establishment of religion and this provides the proper framework of analysis." *Meek v. Pittenger,* at 421 U.S. 349 (1975), at 358, 359.

In *Lynch v. Donnelly,* this Court made a *Lemon* analysis holding that a creche included in a seasonal display did not violate the Establishment Clause. Because of the similarity between the *Lynch* seasonal display and the City's display,[3] it is clear that an application of the *Lemon* test to the City's Christmas seasonal display manifests no Establishment Clause violation.

A. The City's Purpose For Including A Menorah In Its Christmas Holiday Display Was Clearly Secular.

Under the first part of the *Lemon* test, the government action under scrutiny must be found to have a secular purpose. This "purpose test" has generally received loose application, and in most cases, any showing of probable secular purpose has been accepted as sufficient. See *L. Tribe, American Constitutional Law,* 14-8 (1978). In *Lemon v. Kurtzman,* this Court set forth that the legislation there under review states that it has a secular purpose, and if nothing undermines that purpose, it must be accorded appropriate deference. *Lemon v. Kurtzman,* 403 U.S. at 613.

The sign in front of the Christmas tree bearing the Mayor's seasonal message states unequivocally the secular

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[3]The display in *Lynch* is very similar to the City's display. It included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, figures representing a clown, elephant and teddy bear, colored lights, a banner that read "Seasons Greetings" and the creche.

purpose of the display. It stated that the "festive lights" are to remind us that we are the "keepers of the flame of liberty and our legacy of freedom." The Christmas tree lights, as well as the lights of the menorah, were the lights referred to in the Mayor's message. This Court found that the creche display in *Lynch v. Donnelly* served a legitimate secular purpose (*Id.*, at 681). The City's seasonal display, which includes a menorah, also serves such a secular purpose."

Since no evidence was presented that undermined the City's stated purpose, the announced secular purpose must be accorded appropriate deference.

B. Including A Menorah In The City's Seasonal Display Does Not Have The Direct And Immediate Effect Of Advancing Or Inhibiting Religion.

In order to meet the second part of the *Lemon* test, the government action must have a primary effect that neither advances nor inhibits religion. *Lemon v. Kurtzman,* 403 U.S. at 612-613. Application of the effect test to a passive display is not an objective test, but is based on how observers of the display react to or think about it. Nevertheless, the Third Circuit held that inclusion in a seasonal display of an object with religious connotations, such as a menorah, violates the Establishment Clause.

This view was rejected by the Court in *Lynch v. Donnelly, supra.* Both Chief Justice Burger's majority opinion and Justice O'Connor's concurring opinion made clear that the "effect test" does not require that no benefit at all be conferred upon religion or that in a passive display an object with religious connotation must be deemed per se to advance religion. Chief Justice Burger stated that

"not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch v. Donnelly,* 465 U.S. at 683.

Justice O'Connor, in her concurring opinion, went even further when she stated that:

> "Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect-prong of the *Lemon* test is properly interpreted not to require invalidation of governmental practice merely because it, in fact, causes, even as a primary effect, advancement or inhibition of religion." 465 U.S. at 691-692.

Both Chief Justice Burger and Justice O'Connor referred to laws upheld by this Court even though they conferred as a primary effect some favorable benefits upon religion. Examples cited included property tax exemption for religious institutions; mandatory release time from school for off-campus religious instruction; expenditure of funds for transportation of students to church-sponsored schools; grants to church-sponsored colleges and universities; and opening of legislative sessions with prayers. *Lynch v. Donnelly,* 465 U.S. at 681-682, 692.

In concluding that the inclusion of a creche in a Christmas display does not violate the Establishment Clause merely because its "reason or effect merely happens to coincide or harmonize with the tenets of some religion," Chief Justice Burger stated that:

> "Whatever benefit there is to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than Congressional and Executive

> recognition of the origin of the Holiday itself as "Christ's Mass" or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683.

Echoing Chief Justice Burger's holding, Justice O'Connor aptly summarized the effect test as it related to the creche display:

> "Although the religious and indeed sectarian significance of the creche, as the District Court found, is not neutralized by the setting, *the overall holiday setting changes what viewers may fairly understand to be the purpose of the display*—as a typical museum setting, though not neutralizing the religious content of a religious painting, *negates any message of endorsement of that content.*" [Emphasis added]. 465 U.S. at 692.

Application of this Court's analysis in *Lynch* to the effect test in this case makes clear that the Third Circuit's holding is erroneous. If a creche which depicts a central religious event of this country's dominant religion does not advance religion and violates the Establishment Clause, a Chanukah menorah, which is both a religious and cultural symbol of a minority religion's feast commemorating a battle, cannot advance religion and violate the Establishment Clause.

Even if the menorah were solely a religious object, in the secular context of the entire display, it is clear that any benefit conferred upon any religion as a whole is simply non-existent. No viewer of the City's display would believe that the purpose is an endorsement of that religion. Thus, the City's inclusion of a menorah in its Christmas display satisfies the second part of the *Lemon* test.

C. The City's Christmas Display Does Not Involve It In Excessive Entanglement With Religion.

The third part of the *Lemon* test focuses on the degree and quality of the governmental interaction with religion that the challenged activity promotes. *Lemon v. Kurtzman,* 403 U.S. at 615. The test has two components. The first component of the test, "administrative entanglement," applies where the activity brings government officials into close, ongoing contact with affairs of religious institutions thereby endangering the independence and integrity of both Church and State." *Id* at 615 and 620. The second component is whether the questioned activity causes political divisiveness, but this alone is not sufficient to invalidate the government's action under the Establishment Clause. *Lynch v. Donnelly,* 465 U.S. at 684.

The entanglement test unequivocally favors the City. The menorah in question is owned by the Intervenor, Chabad. Although the City has stored the menorah between seasons, no City funds were expended upon it for maintenance. The District Court found that "The expense to the City is minimal and of no consequence." (Cert. Pet. 42a). In *Lynch,* Pawtucket had originally purchased the creche, but no expenditures for maintenance were subsequently necessary and the creche was then valued at $200. *Lynch v. Donnelly,* 465 U.S. at 684. The Pittsburgh facts are even more favorable than those in *Lynch* as Pawtucket actually used public funds originally to purchase the creche, and Pittsburgh did not.

As in *Lynch,* both the District Court and the Third Circuit found that the City met the third part of the *Lemon* test because the City's seasonal display did not foster excessive entanglement with religion. Nor is there any evidence that the display engenders political divisiveness or a

potential of political divisiveness. As the City's actions satisfy the three-part test in *Lemon*, there is no violation of the Establishment Clause.

III. THE DISPLAY WAS NOT VIOLATIVE OF THE ESTABLISHMENT CLAUSE BY VIRTUE OF BEING LOCATED AT A BUILDING DEVOTED TO CORE FUNCTIONS OF GOVERNMENT.

Implicit in the Court of Appeals invalidation of the City's and County's displays was that "Each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." (Cert. Pet. 17a). Apparently, this was a major factor considered by the Third Circuit in applying its variable "location of the display" test. A review of *Lynch* and other decisions of this Court reveals that the location of the display is irrelevant to determining whether a governmental activity violates the Establishment Clause.

In *Marsh v. Chambers, supra,* this Court said that "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," and the Court noted that in this Court and other federal courts, proceedings are opened with an announcement that concludes "God save the United States and this Honorable Court." *Marsh v. Chambers,* 463 U.S. at 786. If those public religious manifestations that occur "within" and "incorporated" in the core functions of government are permissable, surely those that occur "at" the core function of government similarily must be permissable.

CONCLUSION

For the reasons stated and upon the authorities cited, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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